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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/729,552	12/05/2003	Mark E. Deem	514362000204	4326

7590 12/03/2010
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EXAMINER

YABUT, DIANE D

ART UNIT	PAPER NUMBER
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3734

MAIL DATE	DELIVERY MODE
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12/03/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/729,552	Applicant(s) DEEM ET AL.	
	Examiner DIANE YABUT	Art Unit 3734	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 15 November 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: _____.
- Claim(s) objected to: _____.
- Claim(s) rejected: _____.
- Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/EDUARDO C. ROBERT/
Supervisory Patent Examiner, Art Unit 3733

/Diane Yabut/
Examiner, Art Unit 3734

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments filed 11/15/2010 have been fully considered but are not persuasive.

Applicant generally argues that the ports 86 and 88 Yoon are not capable of releasably adhering to first and second areas of tissue since they are too small for providing reliable adhesion to wavy and undulating tissue. The examiner asserts that ports 86 and 88 are capable of suctioning tissue areas (col. 7, lines 9-24) since suction force is provided to "evacuate or aspirate fluid from the operative site" which may be adequate for "releasably adhering" to tissue areas, as required by the claims, and not necessarily "reliably" adhering to "wavy and undulating tissue."

Applicant also argues that Yoon does not teach a septum 223 which is removable from between openings 86 and 88. The cutting member 223/228 is considered to be a septum or a "dividing partition" between the openings since it may be "positioned between parallel pairs of forceps jaws" and therefore positioned between the openings 86 and 88 since the openings are positioned on the jaws (Figures 16-17; col. 9, lines 25-29). The cutting member may therefore be movable from between the first and second openings since the cutter may extend as far as distally beyond the jaws (col. 9, lines 15-20) as recited in the claims.

In addition, applicant argues that the tissue is cut by the cutting member or septum only after the fastener is put into place, and does not meet the limitation of the septum being removable from between the first and second openings "to allow" the at least one fastener to be put into place. Since the cutting member may move from between the openings and retract within the housing before applying the fastener, this meets the limitation. The method steps of removing the septum before deploying the fastener is not recited, but rather that the septum is capable of being removed in order to clear the way to "to allow" the fastener to be deployed.

In addition applicant argues that openings 86 and 88 are not in fluid communication with the inner hollow cylinder 89. However, valve 62 can be coupled with a vacuum source to create suction through the inner cylinder 89 via passages or tubes 86 and 88 (col. 7, lines 9-24) and therefore the openings must be in fluid communication with the inner hollow cylinder.

In regards to Adams, applicant generally argues that the groove 19 and slit 34 (first and second regions) do not releasably adhere to tissue because they do not contain vacuum ports, or that the septum is longitudinally positioned or abrades tissue. However, the tissue adheres to the regions by virtue of a vacuum applied in the first and second regions (in the slot), since Adams et al. disclose utilizing suction through a common channel in fluid communication with the first and second regions of an endoscope 8 (Figure 19c; col. 14, lines 56-64), and the tissue is held between the regions when the stapler and anvil surfaces meet to fire the staples. The common channel may be separated via the septum from the distal end of the device wherein the septum is longitudinally positioned in the tissue positioning device, wherein a longitudinal axis is formed from one end 631 of the septum to the other end 625 of the septum (not necessarily the longitudinal axis of the stapler), and also defines a surface 627 that is adapted to abrade adjacent tissue, and may heat tissue as a result of abrading (Figures 27 and 29).